IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 14,700

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

IDAHO EGG PRODUCERS, INC.,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT

ELI A. WESTON,
J. L. EBERLE,
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STATEMENT OF THE CASE

The original Charge in this case was filed in September, 1953, with the hearing on the Complaint held on January 26 and 27, 1954, and the Trial Examiner's Intermediate Report was filed March 23, 1954, with this Report being approved by the Na-

tional Labor Relations Board on January 6, 1955.

The Petition for Enforcement was filed with the Court of Appeals on the 23rd of March, 1955, and the Brief for the Board was received by the Respondent on October 3, 1955.

The Order required the Respondent to

(1) Bargain with the Union,

(2) Cease and desist from interrogating the employees as to their membership in or activities on behalf of the Union,

(3) Cease and desist from interfering with, restraining or coercing its employees, and

(4) Post the usual notices showing the Decision and Order of the Board.

The Petitioner endeavors to sustain the Board's Order by arguing that a preponderance of the evidence shows that the Respondent interfered with the union's organizational campaign in the following respect:

(a) That the Respondent interrogated the employees as to membership in the union; that the Respondent threatened the employees with loss of Christmas bonus and threatened the installation of automatic machinery if the union came into the plant and offered as an inducement the use of the company's car to employees for the purpose of withdrawing from the union and to pay the employees while using the car; and that the Respondent eliminated Saturday work as a further alleged interference with the union.

(b) The Petitioner further argues that an uncoerced majority of the employees had designated the union as their bargaining agent and that the Respondent had refused to bargain as required by Section 8 (a) (5) and (1) of the Act.

THAT THE RESPONDENT INTERROGATED THE EMPLOYEES AS TO MEMBERSHIP IN THE UNION; THAT THE RESPONDENT THREATENED THE EMPLOYEES WITH LOSS OF CHRISTMAS BONUS AND THREATENED THE INSTALLATION OF AUTOMATIC MACHINERY IF THE UNION CAME INTO THE PLANT AND OFFERED AS AN INDUCEMENT THE USE OF THE COMPANY'S CAR TO EMPLOYEES FOR THE PURPOSE OF WITHDRAWING FROM THE UNION AND TO PAY THE EMPLOYEES WHILE USING THE CAR; AND THAT THE RESPONDENT ELIMINATED SATURDAY WORK AS A FURTHER ALLEGED INTERFERENCE WITH THE UNION.

Before answering the Petitioner's arguments in detail, Respondent would like to call the Court's attention to an important characteristic of this case that runs clear through the record and that is the fact that

(1) The organizational campaign was instigated by one or two husbands of employees working in the plant and that almost every employee that was approached was sold on the idea that all memberships

must be kept strictly secret or the plan would be abandoned (R 383).

(2) That unless all of the employees were in the union, none should be in, and that if they were not all in the union the campaign was not to proceed further,

(3) That the purpose for joining the union and signing application cards was to insure the employees of an election, and

(4) That some employees were told that if they did not join the union, they would be fired by the company.

It must be further noted that according to the record, the first knowledge of the existence of the union was given *voluntarily* by one of the employees, William Hoffman, and this knowledge was given to the management because this particular employee was dissatisfied with the way the union was proceeding in its organizational campaign. (R 203, 341, 342). The uncontradicted evidence shows that the employee Hoffman, and practically all of the other male employees as well as female, agreed that if knowledge of the organizational campaign was commuted to the employer, or if the employees did not sign 100%, or if there was not an election, the organizational campaign should be abandoned.

The record clearly shows that after information was voluntarily given to the employer by the dissatisfied employee Hoffman, and after it was shown that there was not to be any election, and after it was shown that all of the employees were

not signed up with the union, the organizational campaign immediately disintegrated and fell apart. It is particularly pertinent to note that the acts complained of were subsequent to the voluntary desire on the part of the employees to disengage themselves from the union and all of the acts complained of on the part of management were subsequent to this premise upon which the organizational campaign was based.

With reference to the loss of the Christmas bonus, the record shows that this statement together with other relevant statements, including the installation of automatic egg candling machines, was based on the economic proposition that if the union came in and made a contract which would cost the company more money, the company would have to eliminate certain free time, bonuses and other costs to the company. (R 237)

The statement by management that the company had plans in the plant safe for the installation of automatic egg candling machines was a true, accurate statement and the evidence shows that the employees were already well aware of this fact and that they knew at all times that there was a constant threat of the installation of automatic egg candling machines. (R 237, 399, 401)

It should be noted that all through the record, and particularly pages 37, 217, 177, 178 and 400, management informed the employees that the question of staying in a union or getting out of a union was entirely up to them. Other statements made by

Manager Slayden to the effect that he had never been a union man and that he hoped the matters could be worked out without involving the union and that the employees would be better off without the union are all expressions of opinion and do not constitute threats or promises.

The record shows that the manager did offer the use of the company's automobile for the purpose of going to the union hall to withdraw memberships, but in this connection it must be noted that this offer was after the employees had decided that the conditions under which they joined the union had been violated and that they had voluntarily decided to withdraw their memberships. It is also to be noted that the time off for taking the trip to the union hall, while in dispute, seems to range from one-half hour to forty minutes and the record shows that it was a customary practice to pay employees for time off if they had completed their quota of work up to the period the time off was taken. (R 272, 402) In this connection the Court should take into consideration the uncontradicted statement by the company that the automobile in question was always available to the employees and had been used on former occasions by the employees, and was made available to them. (R 401)

Much is made of the fact that the Saturday work was eliminated. Respondent feels this to be an unreasonable contention by Petitioner inasmuch as the record shows that Saturday work had been elim-

inated from time to time in previous years. (R 399, 401)

PETITIONERS CONTENTION THAT AN UNCOERCED MAJORITY OF EMPLOYEES HAD DESIGNATED THE UNION AS THEIR BARGAINING AGENT AND THAT THE RESPONDENT HAS REFUSED TO BARGAIN WITH THE UNION AS REQUIRED BY SECTION 8 (a) (5) and (1) OF THE ACT.

The Trial Examiner in his Intermediate Report and Recommended Order expresses considerable doubt as to probative value of the evidence introduced in the case. The entire record shows the testimony introduced was highly conflicting and by no means conclusive. The employees were in doubt as to why they had signed the application cards, they felt they had been imposed upon and deceived and therefore voluntarily renounced the union.

We find the following expressions from the Trial Examiner showing his doubts in the matter. On page 34 of the Record, in considering the question of giving Saturdays off or higher wages and a bonus, the Trial Examiner states as follows:

"Although I consider the resolution a close one, the foregoing findings have been made based primarily upon Jensen's testimony upon direct examination which is supported by Slayden's admissions."

Again on page 36 the following statement by the Trial Examiner:

"Here, too, there is considerable testimony of a

highly conflicting nature in the Record and I have given considerable thought to determination of what actually took place on this morning."

Again on page 41 we find the Trial Examiner in doubt as he states as follows:

"There are, in my belief, several significant disparities in the testimony of this group of witnesses which serve to cast doubt upon the reliability of their testimony."

An examination of the record as a whole will show why the Trial Examiner would consider his resolutions as very close ones as it was quite apparent by the attitude of all of the witnesses, except the promoters, that the employees had voluntarily decided to abondon the union because of the unfair and untruthful methods of organizing. Since the question was so important, the Respondent took the opportunity of having the Trial Examiner hear the testimony of every employee involved. While the Respondent was unable to find two employees, all other employees were called to the witness stand including those subpoened by the General Counsel but not called by him, showing the attitude and desires of the employees. After hearing these employees, it is quite easy to understand how the Trial Examiner would be confused and would admit that his resolutions were very close ones.

Freedom of choice means freedom from interference from any source whatsoever including both employer and union. There may have been a time when legal principles were not applicable to such

complete freedom in labor cases. We are all aware courts are now applying the general principles of law applicable to the constant, authorization and freedom of choice involved. Taking the overall picture and after hearing the testimony of all the witnesses, it is manifest that the union was not the voluntary and free choice of the employees, that there was no meeting of the minds and that the employees had a right to withdraw from the union or renounce the union as their representative when they did.

The union takes the position that the so-called authorization cards authorized it to represent the employees. This must be based upon a contractual relationship whether it be agency, power of attorney or other agreement. The law first requires that there be a meeting of the minds in the excution of such an agreement. The law also requires that the agreement be made freely and not upon any misrepresentations whatsoever within the general principles known as fraud. Manifestly, if such agreements had been entered into by violence or coercion, they would be set aside. So likewise if there is no meeting of the minds and if employees signed the same upon representation of facts which were not true and known by the union or its representatives not to be true at the time they were made, such agreements would be set aside with the same efficacy as if obtained by violence. In the instant case, as in the case cited below, the statements by the employees as to how they were deceived upon sign-

ing the applications was not discredited. (NLRB vs. Dadourian, 138 F2d 891, distinguishing NLRB vs Dahlstrom, 112 F2d 756, and NLRB vs Karp, 134 F2d 954.)

In the above case the Court held that where the statements made by the employees representing the union were definite and unequivocal, such as they are in the present case, that the representations constituted an interference with the employees' freedom of choice and vitiated the authorization cards, the Court stating: "We cannot agree that the statute sanctions the selection of a bargaining representative by such means. Fraud—which this was—will vitiate consent as well as violence, and the Board itself implies that a vote procured by violence should not be counted." This case was decided in 1943 and before the 1947 Amendment which would strengthen the Respondent's position.

Assuming that Velma Armstrong is within the unit there would be 27 employees of which the union claims 18 cards. If Velma Armstrong were eliminated, there would be 26 employees of which the union would have 17 cards. This count includes the two cards which the union claims it lost. In either event, the union claims a majority of 4. More than four employees can be eliminated upon any one of several grounds.

We felt that the Examiner thought that we were unduly prolonging the hearing by introducing all of the employees and asking them with reference to the back ground of their signing the cards. How-

ever, it is now apparent how important such back ground or premise becomes. The misrepresentations become important because there is no desire on the part of the employees to become organized and the only reason that they joined was in reliance upon the representations above mentioned, each one signing on the understanding that if the others were in they wanted to concur. Mr. Godfrey, for instance, testified that they told him everyone had signed and he was the last one. (R 378) Each of the others testified that she was told that the organizers already had a majority or that all the rest of the employees had already signed. See (R 203-240-1-3) Under the general principles of misrepresentation, these statements become important because of the back ground which we have just described. It was for this reason that we inquired of the organizers the order in which they approached the various employees. The examination of this order considered with the testimony of the other employees makes it crystal clear and without conflict that the representations made to these employees were false under the general rules of meeting of the minds and free and voluntary authorization. (R 259) The representations being false, the organizers knew at the time they made the statements that the same were untrue. This case therefore meets every requirement for the setting aside of such relationship based upon misrepresentation. (R 379)

In the case of Going, it will be remembered there was also thrown in the question of a possible fine.

(R 347-348) In the case of Ellsworth it was his understanding that it was merely to attend a meeting. (R 354-356) However, all through the testimony it will be noted that the employees understood that the matter would come to a vote and this is what they had in mind when they signed the cards. (R 237-350) The union proceeded accordingly and the employer consented to an election. It was the union that withdrew the election petition contrary to its original promise of a vote. It will be remembered that some of the witnesses testified to being quite disappointed and deceived about the vote being withdrawn. There is no conflict in the testimony with reference to such misrepresentations. After all of these witnesses were on the stand, General Counsel had an opportunity of putting the organizers back on to deny such misrepresentations. This he did not do. And in view of the overwhelming testimony, it is quite evident that the organizers could not deny that they made these misrepresentations to obtain authorization cards. Employee Ellsworth said he signed to have a meeting. (R 355, 356)

Although the above misrepresentations would be sufficient in any court of law, the record discloses that in more than four instances representations were also made that the purpose of the authorizations was for the sole purpose of a vote and also that if the authorizations were not signed the employee would lose her job. We are mindful of the fact that the organizers could say that if a union contract were made with a union security provision, then all

employees would have to make application for membership in the union or lose their jobs. However, this is not the testimony in this case. At least two of the witnesses testified definitely that the statement was made that they would lose their jobs without any of the qualifications required to bring it within the law. (R 322) (National Labor Relations Board vs. Dadourian E. Corporation, 138 F. 2d 891.)

There was also the representation that if the cards were not signed there would later be a $25 fee which could be avoided by signing the cards. (R 236) It is our understanding of the law that there shall be no discrimination in the requirements for membership in the union. Undoubtedly this representation was also effective. The question again arises, can the organizers use an unlawful representation to accomplish organization by authorizations obtained under such circumstances.

Section 8 (b) (2) of the Act provides that there shall be no discrimination with reference to admission of employees to membership in the union. The General Counsel, in an Administrative Opinion No. 133 (1951) stated that where there was no evidence that the initiation fee would be raised there would be no violation of Section 8 (b) 2. Respondent contends that there is evidence in this case that the union intended to discriminatorily raise the initiation fees at a later date.

In the Ferro Stamping and Manufacturing Company case (1951) 93 NLRB 1459, the Board held

that where the union had exacted discriminatory initiation fees from certain employees the same were ordered returned so that all employees would come into the union on the same basis.

Now let us approach the so-called coercion and offer of benefits alleged by General Counsel. Although the allegations are that such threats and promises were made to the employees, it is now apparent by the case introduced by the General Counsel that the only person to whom the manager talked with reference to such matters was Ruth Jensen. As is the case in most hearings, the witnesses do not all remember the circumstances in the same light. However, taking this case as a whole, and particularly the testimony of the witnesses who seemed most intelligent and nonpartisan, it is apparent that when the manager talked to the girls first on Saturday morning it was early in the morning and he merely told them to get back to work but also stated *if they wanted to join or not to join the union it was up to them to decide.* (R 260) Then word was sent to him that the employees wanted to withdraw from the union. He then went down and told them that if any of them wanted to do so they could do so as soon as they finished their work and that if they had no transportation they could use his car. It was custom and practice to pay for time off at end of shift if quota had been made. (R 402)

There is conflict in the testimony about what the manager did say to Ruth Jensen. There was mention of the machine and Saturdays off. There was

no denial however that the question of the machine was merely a matter of economics and that the manager told Ruth that if wages raised to the point where it was uneconomical, he would have to put the machine in. (R 237) So likewise with Saturdays, if it was feasible in view of the season load, he would do the same as he had done the summer before. However, regardless of this conference, Ruth did not go to him as a representative of the employees. She said she went on her own. The manager did not talk to her as representative of the employees. Some of the witnesses said they talked to Ruth and it was Ruth that told them that the girls generally wanted to withdraw. In any event, the employer made no statements, promises or threats to the employees. (R 257-8, 278, 289, 329, 360, 367, 370) Here again is further corroboration of the back ground originally mentioned herein that most of the employees had no particular interest in the union. The Examiner will remember that several testified that the day after they signed, they were sorry that they had signed and in one case the employee asked for her card to be returned. It was corroborated. Statements were made that the employees only were willing to join if all the rest of them did. When some of them wanted to withdraw, the rest of them likewise fell in line. In other words, they then all wanted to withdraw. There is no testimony that such a desire to withdraw was coerced or influenced in any way by any statement made by the manager. (R.260)

In the case of NLRB vs. Mayer, 196 F. 2d 286, a case decided in 1952, the Fifth Circuit Court of Appeals holds that up to the time of a certification by the Board, the Respondent is authorized and permitted to accede to the wishes of the majority of his employees. This case also held that while the employees have the right to designate their collective bargaining agent, they also have the right to revoke the designation.

On page 289 of the above case the Court distinguished the case of NLRB vs. Mexia Textile Mills, 338 US 563, and the case of NLRB vs. Sanson Hosiery Mills, 195 F. 2d 350, on the grounds that those cases decided that an employer who was in doubt was taking a chance by not recognizing the union. In the Mayer case, as in this case, there is no doubt in the mind of the employer as the expression by the employees as of Saturday, September 26th, made it very clear that the employees did not wish to be represented by the union.

The Court, in the Mayer case, referred to the case of NLRB vs. Hollywood-Maxwell Co., 126 F. 2d 815, headnotes 7 and 9, as follows: "If we should compel the respondent to bargain further with this union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice . . . . . It has been held that the employer can do this, even where the bargaining union has been duly certified by the Board."

In the Mayer case as in this case the employees wanted the matter decided by an election. In the Mayer case the employer filed a petition for an election but the same was denied by the Regional Director and Unfair Labor Charges were filed.

As heretofore pointed out, we believe that the authorization cards were not valid because they were not the free and voluntary act of the employees and were obtained by misrepresentation. However, even though at the time they were handed to the organizers, these cards were valid, nevertheless at the time that the employees requested withdrawal they were entitled to do so and Mr. Lott had no right to refuse them. *It is significant that at that time he told them it would have to come to a vote.* Having used this representation as a ground for refusal to permit withdrawal, the union then proceeds to further deceive the employees by withdrawing its petition for an election.

The position of General Counsel is that the Examiner should infer from the circumstances that the statements of the manager had the effect of interference by reason of threats and promises. In other words, that the Examiner must infer that the interference was both the objective of the manager but was also effective upon the employees. With reference to the object of any remarks made by the manager, it will be noted that throughout the entire hearing, every witness testified that in every instance where the manager said anything, he also said that whether any employee joined the union

or did not join the union was optional with such employee, that it was the choice of the employee. This is uncontradicted by any of the organizers. Now as to the effect of any statements by the manager, as above stated General Counsel asked the Examiner to so infer. *It was for this reason that we asked the witnesses of the effect, if any, the statements made by the manager had upon such employee.* The Examiner permitted the answer with the comment that there was a question as to such subjective testimony. It is our contention that the Examiner must either infer the subjective state of mind of the employee or rely upon the statement of the employee as to the subjective state of her mind in fact. There was certainly nothing in the demeanor of the employees to indicate that they were under the influence of any pressure from anyone when they testified that their decision to withdraw was not influenced in fact by any statements of the manager. The question then is, can an Examiner infer a state of mind contrary to the positive testimony of the person involved as to a state of mind. However, this is again only corroborative of the situation hereinbefore described and it is manifest that the employees had determined to withdraw before the manager was notified and then he offered to assist if his car was necessary, which offer no employee accepted. In other words, in view of the whole picture, certainly no useful purpose could be served by any attempt to force either the employer or these employees to now bargain.

This case presents a good example of the dangerous practice of interfering with an employees right to vote by depriving him of his freedom of choice through an election. The evidence shows that the union, by deceptive and pressure tactics, obtained signatures from seventeen reluctant employees and was holding them by a very flimsy thread until the employees discovered they had been deceived. Upon discovering the union's tactics the employees decided to renounce the union as their bargaining agent. If there has ever been a case where the value of the right of election is apparent, this is such a case.

The Respondent has no fault to find with the holdings that where the employer, by its overt acts, deliberately scuttles the union by threats and promises thereby preventing a fair election, but that is not true in this case. The Respondent subscribes to the statements of the Chairman of the National Labor Relations Board as made in the case of Southeastern Rubber Manufacturing Company, Inc., 106 NLRB 157, Case No. 10-CA-1578, decided August, 1953, when he stated as follows:

> "It is not, nor could it be, claimed that on the foregoing facts alone the Board should hold the (employer) guilty of refusing to bargain with the majority representative of its employees. Signatures to applications for union membership, obtained in the course of personal discussions of the pros and cons of collective bargaining, are unreliable as evidencing the employees' considered de-

sires. It is for this basic reason that the statute provides for government-supervised tests of the employees' choice, and it seems to me plain that, except in extraordinary circumstances, we ought not substitute a doubtful test for a conclusive one."

The incidents in this case date back to the summer of 1953 and take place in a plant employing unskilled female help and we think it reasonable that the Court take judicial notice that this type of help is transient and not particularly stable and subject to a rapid turnover. This group of employees has no particular community of interest, is not skilled, not a member of a craft and very loosely held together, if at all. Under these circumstances, wouldn't it have been better and more equitable, for the Board to have conducted an election, if not at the time of the hearing, at a later date when the atmosphere would have been appropriate?

DELAY ON THE PART OF THE BOARD IN FILING ITS PETITION

The Respondent is familiar with the pronouncements of the Courts in the cases of NLRB vs. Norfolk Shipbuilding and Drydock Corp., 172 F2d 812, NLRB vs. LaSalle Steel Co., 178 F2d 829, which also follow the statement by the Supreme Court in the case of NLRB vs. Pool Manufacturing Co., 339, US 577, all of which in effect hold that a delay on the part of the Board in filing a petition is no defense to the petition by the Respondent. In deciding the Norfolk Shipbuilding case and LaSalle Steel Co.

case, the Court held that while the Court would not exercise its injunctive power except in accordance with equitable principles, there was no violation of equity in that case inasmuch as the employer could have protected himself by filing a petition with the Court of Appeals prior to the time the petition was filed by the Board, and secondly that there was no hardship shown on the part of the employer.

In the Pool Manufacturing Co. case (supra) the Supreme Court did not pass upon the question of whether a period of delay through its length alone might mature into a denial of an enforcement decree or make necessary the introduction of additional evidence, but did hold that the case before it did not violate equity, and showed no hardship on the employer. The Supreme Court cited in its opinion the case of NLRB vs. Eanet, et al, 179 F2d 15.

In the Eanet, et al, case, the Court of Appeals for the District of Columbia held that where the National Labor Relations Board petitions the Court to enforce its Order, *enforcement must appear to be presently desirable*, and when the Order is based on data two years old, there should be some reasonable indication that the Decree enforcing the Order is warranted, the Court stating as follows:

> "An enforcement order of this court is a serious exercise of judicial power and, once such an order is issued, we intend it to be observed, literally and without equivocation. We feel that we must take a realistic view of the present case. There would be nothing realistic, in our view, in direct-

ing these respondents to bargain collectively with a named union on the basis of a showing that more than two years ago the union had been selected by six out of nine or ten bellboys, maids and a houseman in this small hotel. We, therefore, decline to issue the enforcement order.

"If it be that the conditions found to have existed in April, 1946, continue to exist, the Board can easily bring its information up to date. If the employees wish to organize, or if the union claims to represent a majority, an election ought to be requested."

It would appear from the above cases that this Court has a right to ask the Board to show that enforcement of its order is equitable and reasonable at the time the petition is filed. We appreciate that matters that have transpired since the record was made in this case are not before this Court, but in light of the opinion in the Eanet, et al, case (supra) we feel justified in stating that since the record was made in this case the employees have sought unsuccessfully by a petition to the National Labor Relations Board to have the question of representation determined by an election and that the Respondent has also unsuccessfully requested an election to be held among its employees to determine the question of representation and that these requests have been turned down by the Board. Certainly after two and a half years a request of this kind from the employees by way of petition is not an unreasonable request in light of the decisions above referred to.

There is a marked difference in this case as compared to either the Norfolk Shipbuilding case (supra) and the LaSalle Steel Co. case (supra) or the Pool Manufacturing Co. case (supra) on the question of whether or not the employer was guilty of laches in failing to file a petition on its own behalf. In the instant case the record shows that the organizational campaign started in the summer of 1953, the hearing was held in January of 1954, the Intermediate Report was filed in March of the same year, but the Order of the Board was not filed until January, 1955. Up until that time the Respondent *could not go into court if it wanted to* and we think the Court of Appeals should consider this fact seriously particularly in face of the flimsy and untenable hold that the union had on its slim majority. A further showing of unreasonable delay is evidenced by the fact that the petition was filed in March, 1955, but the brief by the Board was not received until October, 1955, a further delay of seven months.

As stated above, several changes have transpired during these long delays over which the Respondent has had no control. In the cases cited above on this point, the Court stressed the fact that no particular harm would result in enforcement. If the intervening facts were disclosed to this Court it would show that harm would result by the enforcement of this decree. In this case the employees have, by petition to the Board, signified their desire to be no longer represented by the union for purposes of collective bargaining and an enforcement of the order would

infringe upon that right which would certainly constitute a hardship.

The question of unreasonable delay in equity proceedings is referred to in the case of New Standard Publication Co. vs. Federal Trade Commission, 194 F2d 181, in which the Fourth Circuit Court held that orders of an administrative agency must be based on evidence giving them reasonable support and such support is not given for orders relating to present and future unfair trade practices but evidence relating only to transactions which occurred many years before it was entered, also holding that where the injunctive power of the Court is exercised for enforcement of an administrative order, the order must be appropriate for present enforcement. In rendering its decision the Court referred to the NLRB vs. Eanet, et al, and NLRB vs. Norfolk Shipbuilding and Drydock Co. cases (supra), the Court stating in this case as follows:

> "No one would contend that a cease and desist order should be upheld if all the evidence supporting it related to business practices which occurred ten years before the filing of a proceeding."

In this case, the order of the Commission was vacated without prejudice to the entry of such order as might be appropriate under *present circumstances.*

In the case of NLRB vs. National Biscuit Co., 185 F2d 123, the Third Circuit, in a Per Curiam Decision, held that a National Labor Relations

Board order is not enforced unless enforcement is consistent with the principles of equity. In that case, as in the present case, certain parts of the order had been complied with (in the present case the Respondent has posted a part of the required notice of the Board). The Court stated as follows:

> "The powers conferred upon this Court by the National Labor Relations Act to enforce the orders of the Board are equitable by nature and may be invoked only if the relief sought is consistent with the principles of equity."

In this case the petition was granted in part and denied in part.

In the case of NLRB vs Warren Co., 214 F2d 481, on a petition for contempt, the Fifth Circuit denied the petition in a case very similar to the present case. In that case, as in this case, the Respondent had complied with certain parts of the order and refused to comply with the part of the order requiring the Respondent to bargain with the union on the grounds in that case as in this case that a majority of the employees had repudiated the union and petitioned for the decertification, the loss of the union majority being due to a natural turnover among the employer's personnel.

In that case the Court denied the petition for contempt and in that case as in this case the Respondent requested the Board to take proper steps to inquire into and determine the question of union representation and the Board refused to do so. On this question the Court stated as follows:

"* * * the respondent in good faith determined that it would be unlawful, unwise, and unfair for it to bargain with the union, and that it would not be contemptuous of it to refuse to bargain with it as representative of its members. Under these circumstances, we think that the Court, instead of vindicating, would stultify, itself and its decree and do violence to the Act if it ordered the employer to force upon its employees as bargaining agent a union not of their own choosing merely because some six years before the Board had ordered the employer to recognize it as bargaining agent for its then employees."

In this case the Court referred to NLRB vs Aldora Mills, 197 F2d 265, the Court in that case stating as follows:

"Our examination of the record made in this proceeding in the light of the briefs of the parties, * * * and of the controlling decisions, leaves us in no doubt that the respondent, in declining to continue bargaining with the union as ordered by our decree, acted in the utmost good faith and in the sound belief engendered by the decertification petitions and the notices and information it had received from its employees that it was proper under the Act and our decree for it to do so."

In this case the Court distinguished its own case of NLRB vs Sanson Hosiery Mills, 195 F2d 350.

Before concluding this Brief, we wish to call the Court's attention to the fact that the Respondent was denied the right of oral argument before the

Board. (R. 78) One of the chief complaints to the National Labor Relations Act and its administration is the fact that the employer is deprived of his day in court. In most cases the employer is not given an opportunity to argue his side of the case in court for a year or longer after the case is started by the Board and it is the feeling of this Respondent that had we had an opportunity to appear before the Board and orally present the facts and circumstances which we are presenting in this Brief, and had we had an opportunity to explain orally to the Board the Respondent's position, a different ruling might have ensued and this petition would not have been filed.

CONCLUSION

This case rests upon a consideration in equity of the following:

(1) In light of the dissension and dissatisfaction among the employees with their union representative and the flimsy, questionable hold that the union had on its slight majority, and in view of the fact that there was no meeting of the minds on the question of why or under what circumstances the employees signed the union application blanks, is it fair and equitable, to order the Respondent to bargain with the union without an election?

(2) Since this proceeding is in equity, is it equitable to require the employer to bargain with the union almost two and a half years after the original request was made under a record where the Trial Examiner himself admits that most of the points

in controversy are close and difficult to decide and where he admits the witnesses contradict themselves?

The Respondent feels that the proper procedure in this case would be for the Board to conduct an election as was requested by both the employees and the employer and to determine by that method whether or not the employees wish to have the union as their representative at this time.

The Respondent asks that the Petitioners application be denied.

Respectfully submitted,

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Dated: October, 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. Supp. IV, Sec. 151, et seq.) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Sec. 8 (b) It shall be unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.